**BEFORE THE**

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA**

**DOCKET NO. 2019-390-E**

| | | |
|---|---|---|
| IN RE: Ganymede Solar, LLC,<br><br>Petitioner,<br><br>Dominion Energy South Carolina, Inc.,<br><br>Respondent. | ) | **ANSWER** |

Pursuant to S.C. Code Ann. Regs. § 103-826 and other applicable rules of practice and procedure of the Public Service Commission of South Carolina ("Commission"), Dominion Energy South Carolina, Inc. (formerly South Carolina Electric & Gas Company) ("DESC") hereby answers the Petition filed by Ganymede Solar, LLC ("Ganymede"), on December 20, 2019, in the above-referenced docket (the "Petition"). DESC is named as the Respondent in the Petition,[1] and, as described in detail below, DESC has an interest in this proceeding to ensure that future projects currently in its interconnection queue are not harmed by a decision in favor of Ganymede, the policy objectives of S.C. Act No. 62 of 2019 ("Act 62") are upheld, and that the sanctity of the contracts entered into by DESC is preserved.

## BACKGROUND

Ganymede plans to construct an approximately 75 MW solar generating facility that will be a Qualifying Facility as defined by Federal Energy Regulatory Commission ("FERC") Regulation 18 C.F.R. § 292.204. Ganymede and DESC entered into an Interconnection

[1] To the extent any material allegation of the Petition requires a specific admission or denial, and the same is not addressed herein, such allegation is specifically denied. DESC stipulates that the interconnection agreement in dispute speaks for itself, and DESC has no knowledge—as detailed below—of Petitioner's inability to obtain financing or whether such financing could even be completed in accordance with Petitioner's requested relief.

Agreement on May 7, 2018, which the parties amended on June 15, 2018 (as amended, the "IA"). The IA is governed by the Commission-approved South Carolina Generator Interconnection Procedures, Forms, and Agreements (the "South Carolina Standard"), and copies of the IA and the South Carolina Standard are attached hereto as Exhibit 1 and Exhibit 2, respectively.

Ganymede plans to sell the output of this facility to DESC, but has not yet entered into a Power Purchase Agreement ("PPA") with DESC.[2] However, Ganymede's parent company—Cypress Creek Renewables, LLC ("Cypress Creek")—currently maintains other projects that operate under DESC's PPA. These projects include Huntley Solar, LLC and Palmetto Plains Solar Project, LLC (collectively, the "Other VIC Projects"). The following lists the execution dates of the interconnection agreements and PPAs for the Other VIC Projects:

| | Interconnection Agreement | PPA |
|---|---|---|
| Huntley Solar, LLC ("Huntley") | February 2, 2018 | June 2, 2017 |
| Palmetto Plains Solar Project, LLC ("Palmetto") | September 21, 2017 | May 10, 2017 |

The executed PPAs for Huntley and Palmetto are attached hereto as Exhibit 3 and Exhibit 4, respectively, and these PPAs were filed with the Commission. It should be noted that Cypress Creek received an initial draft of the Huntley PPA as early as May of 2017. Following negotiation of the Huntley PPA, Exhibit 5 evidences that Cypress Creek considered a PPA—which included the VIC Language—for several other projects, including Ganymede's, as "final" in April of 2018. Although Cypress Creek did not execute the PPA for Palmetto, it purchased the Palmetto project from another developer in July of 2017, and, presumably, discovered the VIC Language during its due diligence period. Cypress Creek was therefore well aware of the VIC Language at the time it negotiated a PPA for Ganymede, purchased the Palmetto project, and executed PPA for Huntley.

[2] The Petition incorrectly states that Ganymede has executed a PPA with DESC. Ganymede last initiated PPA discussions with DESC in July of 2018, but, to date, Ganymede has not executed a PPA.

Specifically, Section 5.2(b) of the PPA for each of the Other VIC Projects, as well as the the draft PPA Cypress Creek considered "final" for Ganymede's project, contains the following language (the "VIC Language"):

> Seller shall be responsible for the payment of all charges that result from any change in any applicable law that occurs after the Effective Date that **imposes new or additional** . . . **variable integration charges** . . . imposed, assessed or credited by the transmission provider based on the impacts of energy generated by variable generation projects generally. (emphasis added)

Essentially, the VIC Language permits DESC to implement a variable integration charge (a "VIC") upon counterparties to the PPA in order to recover certain costs it incurs to maintain reliability on its system that are caused by the inherent variability in operation and, therefore, variability in generation output of the renewable energy facility. In other words, Cypress Creek knew because of the operating limitations of its solar facilities that it was only a matter of time before DESC would seek to impose a VIC.

DESC submitted a filing with the Commission on February 8, 2019, in Docket No. 2019-2-E (the "DESC VIC Proposal"), in which it first set forth a proposed value for the VIC. Although the amount of the VIC proposed by DESC was ultimately modified by the Commission, the Commission did approve imposition of a VIC and set forth an interim value for the VIC in its order entered on December 9, 2019, as modified by the Directive entered on January 3, 2020, in Docket No. 2019-184-E (the "VIC Order"). The interim VIC value set by the Commission was $0.96/MWh, and the Commission intends for this value to be in place until the Commission is provided with the results of an integration study performed at its direction.

However, now Ganymede comes with the Petition alleging that the VIC Language, the DESC VIC Proposal, and the VIC Order—even though Ganymede has not even executed a PPA—has rendered it unable to perform its obligations under its separate IA. Specifically, Ganymede negotiated and agreed to a series of project milestones in Appendix 4 of its IA, which

detail "critical" construction and payment milestones and responsibilities "as agreed to by the Parties." Appendix 4 is a one-page document in which DESC and Ganymede created mutually-acceptable terms relating to these milestones. In fact, the milestones contained within Appendix 4 are so crucial to the agreement that it requires the additional signature of the parties—just like the IA itself. Surely, neither party agreed to these milestones without careful contemplation.

The first and second milestone payment ("Milestone Payment 1" and "Milestone Payment 2") are among the milestones contained in Appendix 4. These equal payments represented the total estimated cost of certain facilities, equipment, and upgrades necessary to interconnect Ganymede's project with DESC's system. Originally, the amounts of Milestone Payment 1 and Milestone Payment 2 were each set at $2,611,031.59. However, these amounts were amended by Ganymede and DESC on June 15, 2018—approximately a month before the due date of Milestone Payment 1. The revised amount of each payment is now $2,340,100.00.[3]

Ganymede submitted Milestone Payment 1 in accordance with the IA. However, to date, Ganymede has not submitted Milestone Payment 2, which was due on or before December 27, 2019, and represents money owed to DESC to complete its construction work. *See* IA at Appendix 4. Ganymede alleges that the "sheer uncertainty as to what VIC might be ultimately approved by this Commission" for the PPA—which Ganymede has not executed—rendered it unable to obtain financing for Milestone Payment 2. Petition at 3. Therefore, DESC terminated the IA in accordance with its terms, and submitted the Termination Notice attached hereto as Exhibit 6 to Ganymede on January 8, 2020.

As a result, Ganymede makes the unsupported request that the Commission revive, and then modify, the IA and indefinitely extend the due date for Milestone Payment 2 in order for

[3] The Petition incorrectly states that the amount owed to DESC under Milestone Payment 2 is $2,611,031.59 rather than the lower amount agreed upon by the parties in the amendment. Likewise, the Petition similarly overstates the amount paid to DESC pursuant to Milestone Payment 1.

Ganymede to attempt to arrange financing. *See* Petition at 4. For the reasons set forth below, DESC respectfully requests that this Commission deny the relief sought by Ganymede in the Petition.

**RESPONSE TO ALLEGATIONS OF PETITION**

I. The Petition fails to provide a basis for relief.

The Commission's review of the Petition is governed by S.C. Code Ann. Reg. §§ 103-819 and 103-825, which require the Petition provide a "concise and cogent statement of the facts" and "state clearly and concisely the . . . relief sought." Nowhere does Ganymede actually provide DESC or this Commission with a "concise and cogent statement" of its specific efforts to obtain financing for Milestone Payment 2 or provide evidence of even the slightest support showing how any such efforts were adversely affected by the VIC Language, the DESC VIC Proposal, or the VIC Order. For example, Ganymede has not (i) named any potential financing parties, (ii) cited any adverse communications received from a potential financing party as to the VIC Language, the DESC VIC Proposal, or the VIC Order—issued only 11 days before it filed the Petition, or (iii) proposed any action that, if taken by this Commission, would be sufficient for Ganymede to obtain financing in accordance with the IA. All of these things and more are required by the Commission's own regulations when filing a Petition.

Although Ganymede cites "sheer uncertainty" as the culprit that sent its financing efforts awry, Ganymede has yet to explain how the VIC Language, the DESC VIC Proposal, or the VIC Order—which actually quantified the VIC value—created "uncertainty" that did not exist at the time Ganymede executed the IA. Ganymede does not even articulate what the alleged "uncertainty" is. Indeed, the Other VIC Projects, which all contained the VIC Language in their respective PPA, have apparently encountered no financing issues as a result of the VIC Language, and Cypress Creek actually purchased a project—Palmetto—that had the VIC Language in its

existing PPA (which remains in effect) at the time of purchase. Financing was secured despite the fact that Cypress Creek had no forecasts from DESC or the Commission whatsoever of what the VIC value might be, but only knew that the VIC Language allowed DESC to impose a VIC pursuant to the terms of the PPA.

Curiously, Cypress Creek claims that "in order to obtain financing to construct a solar project, the project must have reasonable certainty about the expected revenues . . . and there [must be] no circumstances calling into question the Project's ability to deliver on the commitments in the IA or the PPA." Petition at 3. Adopting this view, this must mean that the Other VIC Projects provided "reasonable certainty" and eliminated all "circumstances calling into question" their ability to deliver on their contractual commitments because they did indeed obtain financing. However, the PPA for each of the Other VIC Projects contained the now complained of VIC Language. Therefore, given Cypress Creek's experience, it must be that the VIC Language and DESC's corresponding ability to impose an open-ended VIC does not impose the uncertainty that Ganymede claims. Given that (i) DESC's and Cypress Creek's experience evidences that the VIC Language does not create the uncertainty claimed by Ganymede, and (ii) projects can be financed—even purchased—with the VIC Language in their PPA, the claim of uncertainty, along with the complete absence of support, is disingenuous. Ganymede provides no explanation for its conflicting statements.

This claim of uncertainty appears even more strained given that Ganymede has not yet executed a PPA with DESC. In fact, neither Ganymede nor Cypress Creek has contacted DESC regarding a PPA for this project since approximately July of 2018. Whatever impact the DESC VIC Proposal or the VIC Order may have on Ganymede's potential PPA seems to be pure conjecture, as Ganymede has not provided DESC or this Commission with any specific facts as to how potential changes in an agreement it has yet to execute has impacted potential financing

parties. Essentially, Ganymede only puts forth conclusory allegations in the Petition because it is unable to produce any reliable support or evidence that the VIC Language, the DESC VIC Proposal, or the VIC Order hindered any actual efforts to obtain financing in any way. In fact, the only actual evidence before this Commission is that Cypress Creek has purchased one facility and financed others that contain VIC Language in their respective PPA.

Even if Ganymede persuades the Commission to revive, and then modify, the IA, the Commission does not have even the slightest guidance from Ganymede as to what exactly that relief would look like, and Ganymede certainly falls short of its obligation under S.C. Code Ann. Reg. § 103-825 to "state clearly and concisely . . . the relief sought." The Petition simply requests that the Commission "modify" the IA and "grant other necessary revisions." Petition at 5. The Petition may just as likely be requesting a 10-year extension of Milestone Payment 2 as it may be requesting a 10-month extension. Even if Ganymede is granted some form of relief, it is unclear if Ganymede would even be able to arrange financing, as Ganymede itself characterizes the project as "now unfinanceable." Motion to Maintain Status Quo at 1, filed on December 20, 2019, in the above-referenced docket. One would suspect that, at the very least, Ganymede would "clearly and concisely" state a definitive timeline under which it could reasonably negotiate financing, the steps by which it would obtain such financing pursuant to that timeline, and the other provisions of the IA that would need modification as a result. However, once again, Ganymede has provided no explanation as to what its requested relief may look like.

As a result, it appears that Ganymede either had a speculative project or simply mismanaged the logistics and corresponding timeline for its project—a fact that finds no basis for relief under the IA. Because of Ganymede's failure to allege facts or provide an adequate basis for relief, the Commission should deny the relief requested in the Petition as a matter of law.

II. Reviving, and then modifying, the IA would be in violation of the terms of the IA, the South Carolina Standard, South Carolina law, and FERC precedent.

*a. Terms of the IA and the South Carolina Standard*

Pursuant to Appendix 2 of the IA, Ganymede agreed to:

> [P]ay the estimated Interconnection Facilities and Upgrades, in Appendix 6, which together total $4,680,200.00. This amount is the basis for the Milestone Payments in Appendix 4 of this Agreement. Failure to make the payment may result in the termination of the Generator Interconnection Agreement and the withdrawal of the Generator Interconnection Application.[4]

The requirements in the IA and the South Carolina Standard—which is a Commission-approved standard intended to be leveraged when negotiating interconnection agreements—are plain, and the intent is clear. Milestone Payment 2 should be made in accordance with the terms of the IA and the South Carolina Standard or termination may result. Neither the IA nor the South Carolina Standard states that Ganymede is bound to pay Milestone Payment 2 only if Ganymede obtains financing by the due date. Likewise, neither the IA nor the South Carolina Standard excuses the obligation to make Milestone Payment 2 as a result of DESC exercising its contractual right under a PPA to impose a VIC—especially since Ganymede has not even executed a PPA.

Indeed, as Ganymede notes in the Petition, the Commission "is recognized as the expert." *Patton v. South Carolina Public Service Com'n*, 312 S.E.2d 257, 259 (S.C. 1984). Clearly, the Commission has superior expertise and experience in this area, and utilized the same to create the South Carolina Standard and the form South Carolina Generator Interconnection Agreement therein (the "Form IA"). As discussed above, DESC and Ganymede collaborated to create Appendix 4 and the milestones therein—including the deadline for Milestone Payment 2—as required by Section 6.2 of the IA and the Form IA. At the time that Ganymede and DESC were

[4] Not only were these obligations contained in the original agreement, but they were also reiterated in Amendment One to the agreement, which was executed on June 15, 2018.

negotiating the IA pursuant to the South Carolina Standard, Ganymede was aware of the VIC Language in the PPA and was likewise aware that DESC may impose a VIC via Section 5.2(b) of its PPA. Whatever "uncertainty" exists now also existed then. In order to revive, and then modify, the IA, the Commission would have to read-in contingencies to the milestones into the IA—a document that was negotiated freely, scrutinized carefully, and reinforced through later amendment to amounts owed—in order to bail out Ganymede due to language in a PPA that it (i) has not even executed and (ii) was aware existed at the execution of the IA.

Additionally, Section 6.2 of the IA and the Form IA requires Ganymede to "immediately notify [DESC] of the reason(s) for not meeting the milestone" (emphasis added) and propose the earliest date by which it can meet such milestone. However, the Petition indicates that Ganymede has been operating under this "uncertainty" since February of 2019. *See* Petition at 1. Yet, from February of 2019, until the filing of the Petition, DESC was never notified by Ganymede or Cypress Creek that it would not meet Milestone Payment 2, nor indeed that it was encountering any purported "uncertainty," and Ganymede has yet to propose another date upon which it plans to submit Milestone Payment 2. This refusal to timely notify DESC is yet another example of Ganymede's failure to comply with the terms of the IA and the Form IA. If the Commission were to revive, and then modify, the IA, the authority of the Commission-approved South Carolina Standard would be called into question, interconnection agreements (i.e., lawful and binding contracts) executed under this Commission's jurisdiction would be useless, and the industry as a whole would be left with more questions than answers.

*b. South Carolina law*

Furthermore, DESC must administer its queue in a comparable, non-discriminatory manner. Indeed, Act 62 strikes at the heart of this issue, and commands the Commission promulgate certain interconnection standards that "provide for efficient and timely processing . . .

and are fair, reasonable, and non-discriminatory with respect to interconnection applicants, other utility customers, and electrical utilities." S.C. Code Ann. § 58-27-460(A)(3). The issues here are of the type the Commission must mitigate pursuant to its mandate under Act 62—a developer seeking preferential treatment that, if granted, would create queue delays and harm other applicants, customers, and the utility itself. Indeed, other projects have had success operating under PPAs containing the VIC Language—including the Other VIC Projects owned by Ganymede's parent company, Cypress Creek. As such, the IA simply cannot be revived and amended to modify the milestone payment schedule (i) in a preferential manner or (ii) contrary to the express terms of the IA. Ganymede is not uniquely impacted by the VIC Language, the DESC VIC Proposal, the VIC Order, or any related Commission decision, and it does not allege any special or unique circumstances which justify disparate treatment from other similarly-situated developers.

*c. FERC Precedent*

Although FERC precedent does not necessarily bind this Commission, it can be instructive, and the FERC cited precisely this issue when addressing similar circumstances—"[a]n interconnection customer's difficulties in securing funding do not exempt it from meeting the obligations that it agreed to when it executed the [interconnection agreement]." *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,053, at P 30 (2014). Indeed, the due date for Milestone Payment 2 was freely negotiated by Ganymede (a sophisticated party affiliated with Cypress Creek—a large, sophisticated solar developer) and contains no contingencies related to financing, the VIC Language, the DESC VIC Proposal, or the VIC Order.

Assuming *arguendo* that the Commission grants the Petition and revives, and then modifies, the IA to indefinitely extend the due date for Milestone Payment 2, the resulting harm would be felt not only by DESC, but also by DESC's other interconnection customers. The

FERC opined that such extensions might present harm to later-queued interconnection customers in the form of uncertainty, cascading restudies, and shifted costs if the project is removed from the queue at a later date. *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198 (2014) (stating the FERC's goal of "discouraging speculative or unviable projects from entering the queue [and] getting projects that are not making progress toward commercial operation out of the queue"). For these reasons, the FERC has approved termination of interconnection agreements where the interconnection customer failed to make interconnection payments. *See, e.g., Pacific Gas & Electric Co.*, 146 FERC ¶ 61,120 (2014); *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114 (2013). The FERC's precedent is clearly instructive here and seems to endorse DESC's termination of the IA.

If the Commission revived, and then modified, the IA, it would render interconnection agreements negotiated pursuant to the South Carolina Standard meaningless and create an opportunity for developers to flood the Commission with modification requests upon every order issued by the Commission. Therefore, not only would an extension under these circumstances harm other customers, but it would also create a dangerous precedent by gutting the enforceability of Commission-approved procedures. Ganymede correctly points out in the Petition that this Commission is an expert, but then attempts to ignore the Commission's guidelines—guidelines the Commission set as an expert. Thus, neither the IA, the South Carolina Standard, South Carolina law, nor FERC precedent provide relief to Ganymede as a result of its failure to obtain financing by the due date it negotiated for Milestone Payment 2.

III. A revival, and subsequent modification, of the IA is not in the public interest.

Although the Commission has the authority to amend or modify the IA pursuant to S.C. Code § 58-27-980, the Commission must only do so when the "public interest so requires." (emphasis added). Reviving, and then modifying, the IA—specifically, those terms negotiated

and agreed to by both parties—is not within the public interest required by S.C. Code § 58-27-980. Indeed, like its bare claims relating to its inability to obtain financing, Ganymede asserts no public interest justifying the abrogation of a contract, and Ganymede leaves it to the Commission to decipher the public interest that Ganymede asserts requires this extraordinary step. Indeed, it cannot be said that a recognized public interest—such as protecting the ratepayers of South Carolina—is at stake, and nowhere has Ganymede even mentioned the same. Granting the relief requested in the Petition would not contribute to the reliability of DESC's system or benefit DESC's interconnection customers as a whole. There is no public interest which supports granting the relief requested in the Petition, and it would actually be against the public interest to grant such relief. As discussed above, granting the Petition would actually harm later-queued interconnection customers and bring true uncertainty to interconnection agreements within the Commission's jurisdiction.

Cypress Creek is a sophisticated party that has negotiated multiple interconnection agreements and PPAs with DESC. Cypress Creek was aware of the VIC Language as far back as May of 2017, which means that it was aware of the language during the time it negotiated the IA. As noted above, the Other VIC Projects—owned by Cypress Creek—operate under PPAs with the VIC Language, and these projects have been successful in obtaining financing.

Fundamentally, Ganymede complains of DESC simply exercising its contractual right under the PPA to impose a VIC upon counterparties that negotiated PPAs containing the VIC Language. Ganymede is not even a party to a PPA. It appears that when Ganymede pleas for the Commission to revive, and then modify, the IA in the "public interest" (a phrase only quoted once in the Petition, but never argued or supported), what Ganymede truly means is that the Commission should revive, and then modify, the IA in Ganymede's interest.

What the public interest truly requires is a signal of stability and predictability from this Commission in denying the relief requested in the Petition and thereby, in accordance with § 58-27-460(3) of Act 62, provide for "efficient and timely processing" of interconnection queues that is "fair, reasonable, and non-discriminatory with respect to interconnection applicants, other utility customers, and electrical utilities."

## CONCLUSION

For the reasons stated above, the relief requested in the Petition should be denied.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

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Cayce, South Carolina
January 21, 2020

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| IN RE: Ganymede Solar, LLC,<br><br>Petitioner,<br><br>Dominion Energy South Carolina, Inc.,<br><br>Respondent. | ) | **CERTIFICATE OF SERVICE** |

This is to certify that I, Ashley Cooper, have this day caused to be served upon the person named below the ***Answer*** by electronic mail and by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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/s/ J. Ashley Cooper

This 21st day of January, 2020

**Exhibit 1**

**Exhibit 2**

**Exhibit 3**

**Exhibit 4**

**Exhibit 5**

**Exhibit 6**